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STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
E. T. FITZGERALD, P.J., D.E. HOLBROOK, Jr., and G.R. McDONALD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court No. 118670

CARMAN A. HARDIMAN,

Defendant-Appellee.

Court of Appeals No. 213402
Circuit Court No. 97-150129-FH

**BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

JOSEPH SHEERAN
President

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

JANICE M. JOYCE BARTEE (P31901)
Principal Appellate Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5764



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JURISDICTIONAL STATEMENT AND STATEMENT OF THE FACTS

The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, adopt the Jurisdictional Statement and Statement of the Facts as thoroughly presented in the People's brief.

STATEMENT OF THE QUESTIONS PRESENTED

I.

Contrary to the Court of Appeals' conclusion, was sufficient evidence presented at trial to sustain defendant's convictions of possession with intent to deliver less than 50 grams of heroin and possession of marijuana?

The People answers, "Yes"

Defendant answers, "No"

II.

Evidence is relevant if it has any tendency in logic to make a fact of consequence more or less probable than it would be without the evidence. The weight to be given relevant evidence is for the factfinder. Should the doctrine that an inference cannot be based on an inference, like its cousins the "negative all hypothesis consistent with innocence" doctrine, and the doctrine that if circumstantial evidence points to both guilt and innocence, the innocent inference must be drawn, both discredited, be found inconsistent with MRE 401, and be rejected?

The People answers, "Yes"

Defendant answers, "No"

ARGUMENT

I.

Contrary to the Court of Appeals' conclusion, sufficient evidence was presented at trial to sustain defendant's convictions of possession with intent to deliver less than 50 grams of heroin and possession of marijuana.

As to the application of the facts to the law in this case, the Prosecuting Attorneys Association of Michigan, as Amicus Curiae, would join in the excellent brief of the People.

II.

Evidence is relevant if it has any tendency in logic to make a fact of consequence more or less probable than it would be without the evidence. The weight to be given relevant evidence is for the factfinder. The doctrine that an inference cannot be based on an inference, like its cousins the “negativeall hypothesis consistent with innocence” doctrine, and the doctrine that if circumstantial evidence points to both guilt and innocence, the innocent inference must be drawn, both discredited, is inconsistent with MRE 401 and must be rejected.

Introduction:

A. People v Atley

In *People v Atley*¹ this Court reversed a conspiracy conviction, finding the agreement between several persons to go to Missouri to harvest marijuana plants, defendant’s statement that he intended to sell the plants, and the fact that the harvesters were not paid for their work was insufficient to sustain the inference that defendant and the harvesters were involved in a conspiracy to pick the marijuana so it could be sold and the harvesters paid out of the proceeds.

The Court of Appeals to the contrary found:

The jury could reasonably find from the evidence at trial that defendant intended to sell at least some of the 127 pounds of marijuana and would pay his confederates with the proceeds. The jury could infer the existence of the agreement necessary to the charge from the prior preparation and planning engaged in by the parties and disregard the denials of defendant’s alleged coconspirators. While it may have been designed that only defendant would sell the marijuana, the prior combination and

¹*People v Atley*, 392 Mich 298 (1974).

agreement to receive proceeds by those involved was reasonably established and certainly points to the existence of the charged conspiracy.²

In reversing this conviction this Court relied on the supposed doctrine that an inference cannot be built upon another inference:

That there had been no payment of the harvesters, and that the men had returned to Michigan with the marijuana in their vehicle are established facts. From the established fact of acquisition of 127 pounds of marijuana, we can infer an intent to sell, but that is as far as inference may take us.³

The Court concluded that, "Testimony indicating expectation of payment does not establish the facts of an agreement to be paid from the proceeds of a sale in Michigan, not to say agreement to sell."⁴ In so holding, this Court disallowed relevant evidence, redetermined the weight given to evidence by the jury and held the review of sufficiency of the evidence to a higher standard than required in *People v Hampton*.⁵ that is, considering the evidence in the light most favorable to the prosecution, could a rational juror have found guilt beyond a reasonable doubt?

B. Overview:

The inference on an inference doctrine is simply a rule based on a premise of distrust of circumstantial evidence and of the jury's ability to properly discern whether the circumstantial evidence is sufficient to prove guilt beyond a reasonable doubt. A strict reading of the rule is that only one inference can be gleaned from any piece of direct evidence. As enunciated the rule

²Justice Coleman dissenting, 392 Mich at 320.

³Id. at 402-403.

⁴Id. at 403.

⁵*People v Hampton*, 407 Mich 354, 366 (1979), cert den, 449 US 885, 101 S Ct 239, 66 L Ed 2d 110 (1980), decided later.

is unworkable and, is based on a faulty foundation, necessarily leading to inconsistent and sometimes absurd results. The doctrine as interpreted and limited by *People v Orzie*,⁶ where the inference is disallowed only if it is uncertain, speculative, merely conjecture or possibility, or remote would encourage affirmation of the jury verdict in all cases except those where even in the light most favorable to the prosecution a rational juror could not find guilt beyond a reasonable doubt. Even though the *Orzie* interpretation would result in convictions consistent with *Hampton*, the better course of action would be to recognize that this doctrine and any rule that attempts to treat circumstantial evidence differently from direct testimonial evidence results in flawed decisions. Under the law:

- 1) Evidence is relevant if it has any tendency in logic to make a fact of consequence more or less probable than it would be without the evidence.
- 2) The value of relevant evidence is not determined by whether the evidence is direct or circumstantial.
- 3) The weight to be given properly admitted, relevant evidence, whether direct or circumstantial-inferential, is for the factfinder, absent a finding that no rational juror could have found guilt beyond a reasonable doubt.
- 4) At the appellate level, all reasonable inferences must be drawn in favor of the prosecution and the verdict upheld if any reasonable juror could find proof beyond a reasonable doubt. This Court should conclude that there is no difference between relevant direct and circumstantial-inferential evidence. And, any rule of law which is based on inherent distrust of relevant evidence and condones an appellate court acting as a thirteenth juror cannot be left standing, for it is contrary to the foundation upon which our system was built.

⁶*People v Orzie*, 83 Mich App 42 (1978).

Standard of Review:

There is only *one* standard for determining whether the prosecution has presented sufficient evidence to sustain a conviction; an appellate court is required to apply the standard adopted by this Court in *People v Hampton*.⁷ The reviewing court “must consider not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.”⁸ In making this determination an appellate court “must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact.... Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight to be given to their testimony.”⁹ Additionally, factual conflicts must be viewed in the light most favorable to the prosecution. Hence, the proper review standard for sufficiency of evidence is whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, this is true whether the evidence is direct or circumstantial-inferential.¹⁰

Comments made in Justice Boyle’s concurrence in *People v Wolfe*¹¹ are revisited here, but the fear that circumstantial evidence might result in the conviction of an innocent man began

⁷*People v Hampton, supra*.

⁸*Id.* at 414-415.

⁹*People v Palmer*, 392 Mich 370, 375-376 (1974).

¹⁰*Hampton, supra* at 368; *People v Petrella*, 424 Mich 268 (1985).

¹¹*People v Wolfe*, 440 Mich 508, 527-531 (1992) discussing the argument that the prosecution must disprove all reasonable theories consistent with innocence.

a very long time ago and has taken many forms through the years. Some of those forms have been discredited and the inference on an inference doctrine should join them in the dustbin of the history of the law of evidence. As noted in Justice Boyle's concurrence, "The standard for appellate review of convictions based on *circumstantial evidence* has been a persistent source of confusion and conflict for decades."¹² And the assigning of greater value to direct evidence than to *circumstantial evidence* has been doubted and disputed over the years by commentators and courts alike.¹³ If evidence is properly admitted at the trial level then its weight must be left to the jury. The inquiry, then, must begin with where evidence is relevant.

Discussion:

A. MRE 401 and the Standard of Relevance:

MRE 401 provides that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 recognizes that all relevant evidence is admissible unless there is a specific reason to exclude it. MRE 403 then states the only reason relevant evidence should be excluded is if it is unduly prejudicial, unfair, leads to confusion of the issues, is a waste of time, needlessly cumulative, or would mislead the jury. These foundational principles for the admissibility of all evidence are undeniably *inclusionary in nature, favoring admissibility*.

¹²Id. At 527.

¹³See Wigmore, *Evidence*, § 26.

Facts of consequence include the elements of the offense, the credibility of witnesses, and illustrative evidence, regardless of whether the matter sought to be proven is in dispute, as a general denial puts all elements of the offense in dispute. See both *People v Vandervliet*¹⁴ and *People v Crawford*¹⁵ on this point, as well as the Advisory Committee Note to MRE 401:

The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action... The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

The probative force requirement reveals the purpose of the rules to favor admissibility, for the rule does *not* say that the evidence offered must, by itself, make the existence of the fact it is offered to prove more probable than not, but must only have any tendency, however slight, to make the evidence more probable—or if offered in opposition to a fact, less probable--*than it would be without the evidence*. In short, to be relevant evidence need not *be sufficient to prove* the fact toward which it is offered, but only have *some* tendency to make it more or less probable than it would be without the evidence. As Professor McCormick has said, a "brick is not a wall," and one may "prove" the existence of the wall, brick by brick¹⁶ "Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in

¹⁴*People v Vandervliet*, 444 Mich 52 (1993).

¹⁵*People v Crawford*, 458 Mich 376 (1998).

¹⁶ 1 McCormick, *Evidence* (4th Edition), Sec. 185 at 776.

issue? Standing alone, the item of evidence need not have sufficient probative value to support a finding that the fact exists.”¹⁷ Evidence may be direct or circumstantial.

*Wigmore*¹⁸ discusses and defines both direct and circumstantial evidence in terms of the permissible *inferences* drawn from the evidence. “Since the purpose of using evidence is to confirm or deny a proposed conclusion, it is the conclusion to which evidence must be related in order to define the types of evidence in functional terms. This relationship is determined by the inference that can be properly drawn from the evidentiary proposition.”¹⁹ As demonstrated by *Wigmore*,²⁰ if the proposed conclusion is that D killed H, if A testifies that he saw D kill H the logical inference is that *only* D killed H. The difference, then, between direct and circumstantial evidence is demonstrated by the inferential process. Direct evidence has an inference which is consistent *only with* either the proposed conclusion or its contradictory proposition. The inferential process in using circumstantial evidence, however, is not that simple because it requires a series of inferences, and the ultimate inference may, or may not, be consistent with the proposed conclusion *and* its contradictory proposition. There is thus a fundamental difference between direct and circumstantial evidence in that direct evidence is a proposition consistent only with the proposition or its opposite proposition while circumstantial evidence may coincide with *both* the proposition and its opposite. What this demonstrates is that the relevancy of evidence, direct or circumstantial, exists in terms of inferences. Thus, if inferences are to be

¹⁷*People v Vandervliet*, at 60-61.

¹⁸*Wigmore, Evidence* (3rd Ed.) I A. §24, p. 948.

¹⁹*Id.*

²⁰*Wigmore, supra.*

distrusted then both direct and circumstantial evidence are untrustworthy. The determination that evidence is relevant, then, is based upon its relevance to the proposed conclusion, and it is relevant only if it can support an inference which coincides with the proposed conclusion or the contradictory of the proposed conclusion. Furthermore, since relevant evidence must be properly admitted, circumstantial evidence must support either the proposed conclusion or its contradictory. Properly admitted circumstantial evidence thus is always relevant since it must involve an inference from some fact of the proposition that is sought to be proven. It would be helpful to classify all evidence direct or circumstantial based on its relationship to the proposed conclusion. And since the rules of evidence have nothing to say about the weight of the evidence, admissibility should not hinge on a proscription that the jury give a precise effect to one type of evidence as opposed to the other.

B. Circumstantial Evidence and the Standard of Relevance:

While circumstantial evidence is sometimes thought to be less persuasive than direct evidence, an argument could be made that there are times when a case based upon circumstantial evidence is actually a stronger case than one based on direct evidence. It has been said that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither."²¹ Direct testimony gives an implicit assumption that the fact to be proven has been established as true and de-emphasizes the possibility of mistake. On the other hand, circumstantial evidence gives no such mysterious aura of truth. But all testimony direct or circumstantial comes from the mouths of human beings who are prone to be inaccurate at times

²¹Id., p. 957.

inadvertently or otherwise. Even direct testimonial evidence may be a blatant lie, a mistake, or a misapprehension of what was seen, which proves that direct testimony's seeming advantage over circumstantial evidence is a facade. Circumstantial evidence, however, might have an advantage over direct evidence in that circumstantial evidence is inherently suspect and weighed against other facts, logic, life, and experiences. Therefore, well-authenticated circumstances that add up even after suspicions have been tested could provide a stronger ground of assurance of authenticity than the direct testimony, unconfirmed by circumstances. An inference that arises from circumstantial evidence can often be more convincing than any other kind of evidence because of its flawed nature as its imperfection in demonstrating the proposed conclusion subjects it to increased scrutiny before allowing the determination that the inference is valid. Thus, both direct and circumstantial evidence may be relevant to a proposition and if relevant, and not excluded for another reason, the evidence should be admissible.

Although not always clear, there is not one standard of review for relevant direct evidence and a different standard of review for relevant circumstantial evidence. The difficult part of an argument regarding circumstantial evidence and how it should be viewed and weighed is that Courts openly announce that the standards of relevance is the same for direct and circumstantial evidence, but then apply inferentially a higher standard when circumstantial evidence is involved than when other types of evidence are involved. Specifically, as noted by this Court in *Atley*²² "Direct proof of agreement is not required, nor is it necessary It is sufficient if circumstances, acts, and conduct of the parties establish an agreement in fact." Further, "...the circumstances

²²*People v Atley*, 392 Mich at. 310-311.. the *Atley* court disagreeing with the jury and the Court of Appeals as to what was a "fair inference."

must be within safe bounds of relevancy and be such as to warrant a fair inference of the ultimate fact.”²³ Yet in cases relying solely on circumstantial-inferential evidence, there *appears* to be a higher burden of persuasion and rules which work in cases where the appellate court finds the evidence weak and questions the jury’s determination of guilt. When discussing the use of circumstantial evidence *Wigmore* commented, “It was once suggested that an inference upon an inference will not be permitted i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and *sometimes actually has been enforced.*”²⁴ *Wigmore* suggests that courts condemn the pyramiding of inferences when they really intend to condemn speculative and unfounded inferences. “There are any number of decisions which do not altogether prohibit the pyramiding of inferences but which do require that the foundational inference either have the status of a ‘fact’ or that the foundational inference be the *most* plausible or probable among those available.”²⁵ Yet, *Wigmore* presents the following scenario to demonstrate that skepticism of circumstantial evidence can sometimes lead to ridiculous results:

Courts and Lawyers of Indiana (Esarey and Shockley eds. 1916. [In the early days of trial courts in Indiana] the following case of circumstantial evidence is culled from the same “Sketches” as the others. It happened in Judge Eggleston’s court, presided over, however, by the associates. The case was for five dollars damages for killing a dog. The plaintiff testified that he saw the defendant pick up his rifle, run across the lot, rest it on a fence, saw a flash, heard the report, saw the dog fall, went up to him, and saw the bullet hole just

²³*Id.*

²⁴*Wigmore. supra.* pg. 1106 (emphasis added).

²⁵*Id.*

behind his front leg. The evidence seemed conclusive. All appeared lost, but the defendant's attorney was not disconcerted. He knew the associates had just been reading a new law book, Philipp's Evidence, which cautioned judges against the pitfalls of circumstantial evidence. He therefore recalled the witness, had him repeat his evidence and ended by asking him if he saw the bullet hit the dog. When the witness refused to testify to the fact, the lawyer casually observed to the court, "A case of mere circumstantial evidence," and rested his case. After due deliberation, the court announced, "This is a plain case of circumstantial evidence, judgment for the defendant."

While it is highly doubtful that circumstantial evidence this strong would be stifled by a court today, the point is made that circumstantial evidence receives greater scrutiny and is many times received with skepticism even by those who profess that circumstantial evidence is sufficient. It is imperative, especially in a criminal case where direct evidence is minimal and circumstantial evidence oftentimes must be pieced together, much like a jigsaw puzzle, to discover the truth of what occurred. Out of this skepticism over circumstantial evidence two doctrines developed, which raised the burden of proof and haunted criminal trials: 1) that the People must negate all reasonable hypothesis consistent with innocence, and 2) if multiple inferences exist the jury was instructed that it was their duty to accept the one consistent with innocence. These doctrines have been recognized as flawed and inaccurate.²⁶

1. Negating all innocent theories.

The doctrine that the People must negate all theories consistent with innocence required the People to prove their case beyond *all* doubt. In *People v Davenport*²⁷ a conviction which was based on sufficient evidence was reversed and a new trial ordered because there were other

²⁶See *infra*.

²⁷*People v Davenport*, 39 Mich App 252,256-258 (1972).

possible theories consistent with innocence. The opinion in *People v Doss*²⁸ begins “First, we reject the defendant’s claim that, because his conviction was based largely upon circumstantial evidence, the prosecution was bound to disprove all theories consistent with innocence.” In those words the Court acknowledged that the evidence is sufficient if the People prove the case beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce. In *People v Edgar*,²⁹ the court recognized that an appellate court should test the correctness of the denial of a motion for directed verdict not by whether there are other theories consistent with innocence, but by whether the evidence taken in the light most favorable to the prosecution was sufficient to sustain the verdict of guilt.³⁰ The *Edgar* court recognized that the evidence was circumstantial, but an inference could be drawn to infer participation in a theft from the fact of possession of the stolen property shortly after the theft. The *Edgar* Court further recognized that the rule that the People must negate all theories consistent with innocence was “more a rationale for a result, rather than a true objective standard which can be evenly applied in all cases” and noted further, “We often affirm convictions based on circumstantial evidence without extensive comment.”³¹

As noted by the *Edgar* Court, the negating all theories consistent with innocence doctrine justifies a result in a “weak” case, but “problems arise when, as in the present case, the facts fall

²⁸*People v Doss*, 122 Mich App 571 (1983).

²⁹*People v Edgar*, 75 Mich App 467, 471-473 (1977).

³⁰The *Hampton* standard.

³¹*Id.* at 472.

somewhere between the two extremes.”³² Given the facts in *Edgar* were close, the court noted that the doctrine of all theories consistent with innocence would mandate reversal, but went on to discuss why the doctrine should not be applied: (1) the implied distrust of circumstantial evidence is unwarranted, as even with direct evidence an eye-witness could be mistaken as to identity; and, (2) direct and circumstantial definitions are not accurate, “there is a tendency to classify evidence as ‘direct’ if the desired inference is compelling and to call it ‘circumstantial’ if the inference is merely the most likely of several alternatives.” Thus the doctrine is not applied in all circumstantial cases, but rather, only in those cases where the evidence is not compelling. The Court concluded, “...the rule is defective to the extent that it treats circumstantial evidence differently than direct evidence and to the extent that it requires the prosecution to specifically disprove all innocent theories. It should be sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce.” The Court emphasized that “the doctrine rejected represents one attempt to state an easily applied mechanical test for singling out those cases which are too weak to go to the jury, a new test was not proposed, but rather the facts of each case must be reviewed to determine whether a reasonable man could conclude that all the elements of the crime were established.”³³

From *Edgar* it is gleaned that “the implied distrust of circumstantial evidence is not warranted. Whether the evidence is ‘direct’ or ‘circumstantial’ we would not allow a conviction if we felt that the evidence was not sufficient to prove guilt beyond a reasonable doubt. To the

³²Id at 473.

³³Id. 474.

extent that the rule requires the prosecution to disprove all negative theories, the test could never be met, even by direct evidence. For even with eye-witness testimony, there are always innocent theories which are not specifically disproven. There will, therefore, always be a chance that an eye-witness is honestly mistaken about identification.”³⁴ Unfortunately, this doctrine of distrust was also adopted as a standard instruction requiring an inference of innocence be chosen by the jury if two competing inferences were available.

2. CJI 4:2:01(7)–Instruction requiring the jury to accept a theory of innocence when two reasonable explanations are presented.

CJI 4:2:01 and 4:2:02 instructed the jury on a pure circumstantial case and a mixed circumstantial and direct evidence case. The instruction contained language that “the prosecution must negate every reasonable theory consistent with the defendant’s innocence” and optional language that if the evidence “is open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence.” This instruction arose because early cases approved of cautionary instructions on circumstantial evidence. In 1887, the court approved an instruction that the prosecution had to show “that there is no innocent theory possible which will, without violation of reason, accord with the facts proven in the case.”³⁵ And, former instruction CJI 3:1:12 read:

³⁴Id.

³⁵*People v Foley*, 64 Mich 148 (1887).

However, if you have a reasonable doubt as to which testimony you believe, it is your duty to accept the testimony favorable to the defendant.³⁶

Later in 1889 the instruction was approved that circumstantial evidence should be viewed as “links in the chain.”³⁷ But in 1933, the court held, “it is not the particular facts and circumstances claimed by the people that must be proved beyond a reasonable doubt, but the essential elements of the crime charged that must be proved”,³⁸ and required the instruction be given in all cases where defendant’s guilt or innocence depended solely on circumstantial evidence.³⁹ Despite this mandate, in 1951 this Court declined to reverse for failure to give this instruction since other instructions addressed the presumption of innocence, reasonable doubt, and the tests to be applied in determining the credibility of a witness.⁴⁰ In 1983, the court of Appeals found the instructions in CJI 3:1:12 should not be given:

Although requested to do so, the trial judge refused to give CJI 3:1:12(3).... We do not believe it accurately states the law. The issue is whether there is a reasonable doubt as to the guilt of the defendant, not as to which testimony is believed. Certainly conflicting testimony may create a reasonable doubt but we find no basis for the statement that the jury has a duty to accept any testimony where there is a conflict.

³⁶This instruction was based on *People v Crofoot*, 254 Mich 167 (1931). On July 13, 1984 this instruction was deleted.

³⁷*People v Stewart*, 75 Mich 21, 28 (1889). This case emphasized the need to read instructions as a whole because CJI 3:1:12(3) did not accurately state the law.

³⁸*People v Dellabonda*, 265 Mich 486, 513 (1933).

³⁹*Id.*

⁴⁰*People v Larco*, 331 Mich 420 (1951).

The Court of Appeals was consistently critical of the instruction and did not reverse when the cautionary instruction was not given, always finding the instructions as a whole sufficient.⁴¹ In his concurrence in *People v Moore* Judge Hammond referred to CJI 4:2:01 and 4:2:02 as “*the tale of two instructions*.” He went on to discuss the confusion the instructions created with other instructions,⁴² and the oddity of the suggestion that if the jury has a reasonable doubt as to which testimony to believe, it was the jury’s duty to accept the testimony favorable to the defendant. This instruction in essence told the jury to acquit, in fact it was the jury’s “duty” to acquit a defendant even if it may have found defendant guilty beyond a reasonable doubt. Obviously, the problem with this instruction was that it required the prosecution to prove its case to a higher degree of certainty than the already high standard of proof beyond a reasonable doubt. Because of this clear flaw, there were no reported cases where the instruction was not given when requested and where the Court of Appeals found the failure to give the instruction to be error.⁴³ Judge Hammond urged the Court that, “It is not enough to criticize this instruction. That has been done repeatedly. We ought to be forthright about it and simply say that this instruction, now CJI 4:2:02, is bad law, that it is erroneous, and that this instruction should never be given under any circumstance. The United States Supreme Court abolished the requirement that any such cautionary instruction be given in federal courts in *Holland v United States*⁴⁴ finding

⁴¹See *People v Moore*, 176 Mich App 555, 563 (1989); *People v Kent*, 157 Mich App 780, 794 (1987).

⁴²The presumption of innocence, the burden of proof on the prosecutor, the definition of reasonable doubt, and witness-conflicting testimony.

⁴³*People v Moore*, 176 Mich App at 562.

⁴⁴*Holland v United States*, 348 US 121, 139, 75 S Ct 127, 137, 99 L Ed 150, 166 (1954).

circumstantial evidence the probative equivalent of direct evidence and because reasonable doubt instructions adequately protected a defendant from a poorly proven case.”⁴⁵

3. Inference on an Inference Doctrine and the Standard of Relevance

Since this doctrine also attacks circumstantial-inferential evidence, the problems encountered by the earlier discussed doctrines would necessarily be the same, as at the heart of each of these doctrines is a distrust of non-direct evidence and a jury’s ability to properly weigh this evidence. Yet, this concern also demonstrates its largest flaw, as it is contrary to the principle that the jury is the foundation of our legal system and must be trusted to properly weigh relevant evidence. Judge Learned Hand in *United States v Becker*⁴⁶ described a cautionary circumstantial evidence charge as “a refinement which only serves to confuse layman into supposing that they should use circumstantial evidence otherwise than as testimonial.” Historically, there was arbitrary blind adherence to this doctrine when convenient—when needed as a rationale for reversing a conviction with which a reviewing court was not fully content. Like the other two doctrines which attempted to divert the jury’s attention away from the totality of the evidence and the prosecutor’s burden of proof of beyond a reasonable doubt, the inference on an inference doctrine encourages the jury to give defendant an inference of innocence whenever circumstantial evidence by way of multiple inferences is present. Oddly though, an analysis of the cases reveals that the inference on an inference doctrine is not always applied at appellate

⁴⁵*People v Moore*, supra at 564.

⁴⁶*United States v Becker*, 62 F.2d 1007, 1010 (CA 2, 1933).

review—this inconsistent application reveals the fact that the rule does not mean what it purports to mean.

The premise that direct and circumstantial-multiple inference testimony must be weighed differently presumes the jury knows the difference between direct and circumstantial-inferential evidence. With no disrespect to jurors intended, this premise is suspect, and that juries actually sort out direct and circumstantial evidence, and understand this inherent distrust of circumstantial-inferential evidence that has been properly admitted at trial is fanciful. Simply put, a jury knows which evidence comports with life experiences, everyday occurrences, logic and other testimony, but a jury does not contemplate and deliberate on each individual piece of evidence to insure it comports with rules that may be inconsistent with their experiences, logic, and with the other evidence. If the facts before the jury indicate that a murder was committed, defendant had a motive, bloody size 13 prints were seen in the snow leading up to defendant's residence, and defendant is the only person at the house who has size 13 feet, but shoes matching the footprints were not found on the premises, jurors could infer that defendant committed the murder, ran to his house, and got rid of the shoes. Yet, it would be the rare juror who recognizes or discusses the fact that the evidence is circumstantial-inferential even if the attorneys so argued and the trial court so instructed. The jury attempts to piece a puzzle together using logic and experience to test the evidence against as well as testing it against other evidence admitted in the case.

Adding insult to injury, is the fact that permissible and impermissible inferences are usually not discussed with juries, yet a case that the jury finds proven beyond a reasonable doubt could be re-weighed by a reviewing court weighing the "strength" of the inferences in hindsight

and weighing the inference based on whether it is a single or multiple inference inference—a totally irrelevant point. In *People v Orzie* defendant relied on this Court’s decision in *Atley* to claim his conviction should be reversed because an inference of guilt of attempt breaking and entering a safe with intent to commit larceny was drawn from the fact that the safe was moved and had a hole in it big enough for someone to reach into the money tray, and from testimony that tracks in the snow led from the building where the safe was to the basement of the apartment building where defendant was hidden on a ledge with his leg hanging down and with a box containing a roll of bills and a pair of gloves located about three feet from the ledge where defendant was, allowed the inference that defendant was the person who had attempted to break into the safe. The Court of Appeals held:

In *Atley, supra* the Court continues to pay lip service to the now generally discredited “no inference upon an inference” terminology. Indication of the ill repute in which this doctrine is held, is the following from Wigmore on Evidence....In short, we express a preference for abandoning the no inference upon an inference terminology because we believe it to be misleading and uncertain of meaning. There is nothing inherently wrong or erroneous in basing a valid inference upon a valid inference.⁴⁷

The *Orzie* Court also stated, “The underlying theory of the cases that use the no inference on a inference terminology is well and accurately stated in *People v Helcher*⁴⁸ which cites an often quoted Indiana case as follows:

What is actually meant by the statement found in many cases, that an inference cannot be based upon an inference, is that an inference cannot be based upon

⁴⁷*People v Orzie*, 83 Mich at 45.

⁴⁸*People v Helcher*, 14 Mich App 386, 390 (1968).

evidence which is uncertain or speculative or which raises merely conjecture or possibility.”⁴⁹

Orzie also quoted with acceptance *Dirring v United States*.⁵⁰

The defendant cautions us against piling inference upon inference. As interpreted by the defendant this means that a conviction could rarely be justified by circumstantial evidence (citation omitted). The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. (Citations omitted). If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking. Reviewing the evidence in this case as a whole, we think the jury was warranted in finding beyond a reasonable doubt the picture of defendant Diring.”⁵¹

C. Conclusion: Ending the inference upon an inference myth:

The inference upon an inference rule should be abolished because serious implications and issues which would need to be discussed arise from the continued existence of this doctrine and any doctrine that disallows multiple logical and reasonable inferences be made by the jury:

1. Failure to inform the jury of the multiple inference rule: This means that necessarily verdicts would have to be overturned by an appellate court for something

⁴⁹*People v Orzie*, 83 Mich App at 46 quoting *Shutte v State*, 233 Ind. 169, 117 NE 2d 892, 894 (1954), which was quoted approvingly in *People v Eaves*, 4 Mich 457 (1966).

⁵⁰*Dirring v United States*, 328 F 2d 512, 515 (CA 1, 1964), cert den., 377 US 1003, 84 S Ct 1939, 12 L Ed 2d 1052 (1964), reh. den., 379 US 874, 85 S Ct 27, 13 L Ed 2d 83 (1964).

⁵¹Interestingly, Judge Maher in his dissent in *Orzie* suggested that although the inference upon an inference rule was a difficult concept it should not be abandoned reasoning that “abandoning the concept means that defendant loses the protection of his right to be proved guilty of each element of the crime beyond a reasonable doubt. And then adds that defendant’s conviction should also fail for the prosecution’s failure to negate all reasonable theories consistent with innocence. It is appropriate that these two concepts be lumped together, it is inaccurate to say they guarantee that proof beyond a reasonable doubt is shown. In actuality both require a burden of proof greater than proof beyond a reasonable doubt—they require proof beyond all doubt.

which was not even considered by the jury, but was weighed by the jury in making its decision.

2. Jury Confusion: Assuming the jury knows the difference between circumstantial and direct evidence, and that the jury is instructed on multiple inferences, the jury would necessarily be confused with how it is to use its common sense and everyday experiences, yet disregard multiple inferences jurors might make everyday. Also, what is the burden of proof when multiple inferences are logical, relevant, and comport with the jury's experiences? For example, if the testimony reveals a murder scene, size 13 bloody shoe prints leading to defendant's house, the bloody shoes are not found, but defendant is the only person in the house who wears size 13 shoes, and his brother testifies that his Nike shoes he was wearing the day before the murder are missing, the jury might infer defendant's Nike shoes were worn by him when he committed the murder and that defendant had gotten rid of the shoes because they had blood on them.

3. Jurisprudence is left with an unclear Burden of Proof Standard: Many criminal cases are based solely on circumstantial evidence which is composed of inferences and inferences on those inferences. Should an elevated burden of proof standard be set out for those cases where logical and relevant inferences are made out? What is the judge and attorneys' roles in regards to effectively arguing the case? The standard of appellate review must be clarified if the inference on an inference rule is allowed to remain viable. Is it the *Hampton* standard or is the standard different when multiple inferences arise?

4. Preservation of the issue for appellate review: Since preservation is the starting point of an appeal, the dilemma would need to be resolved as to whether the appellate courts should simply act as a thirteenth juror when they deem necessary, if the jury's verdict required the jury to put multiple inferences together, or would the trial attorneys be required to object to the possible inferences, the trial court rule on those objections, and the trial court then instruct the jury as to which inferences are permissible and which are not in order to preserve this issue.

5. Thirteenth Juror/Convictions Reversed even though the jury found proof beyond a reasonable doubt: Presently an appellate court acts as a thirteenth juror re-weighing the evidence de novo when the evidence is "based on an inference on an inference." Is this a practice which should be promoted?

In conclusion, even though with *Orzie* the inference upon an inference rule is construed fairly narrowly, the rule and all of its vestiges should be recognized as unnecessary, confusing, and of no value. If the inference upon an inference rule now stands for the proposition that the

inference cannot be remote, speculative, uncertain, a mere possibility or conjecture, then the rule is a masked restatement of *Hampton*— the conviction must be reversed because no rational juror could have found guilt beyond a reasonable doubt. To attempt to salvage this doctrine with the *Orzie* limitation would simply not be sufficient as it would still leave confusion as to whether or not there is a separate standard of review for circumstantial-inferential relevant evidence that is properly admitted. The inference on an inference doctrine should be admitted to have been a wrong turn, a correction should be made, and a decision based on one standard of review announced. The *Atley* inference on an inference doctrine is wrong in all respects and this Court should so hold.

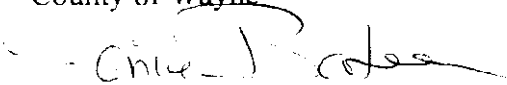
RELIEF

WHEREFORE, the Prosecuting Attorneys Association of Michigan, as Amicus Curiae in support of the People of the State of Michigan request that this Honorable Court reverse the Court of Appeal's decision and reinstate Defendant's convictions, and overrule the no inference on an inference doctrine stated in *People v Atley*, 392 Mich 298 (1974).

Respectfully Submitted,

JOSEPH SHEERAN
President

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne


JANICE M. JOYCE BARTEE (P31901)
Principal Appellate Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5764

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JMJB/cp

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